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No. _____

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the offenses for which petitioner O'Rourke was convicted in Ireland — the design and manufacture of weapons as a member of the Irish Republican Army ("IRA"), solely for the IRA —, and his subsequent escape from prison, are "political offenses" within the meaning of 8 U.S.C. §§1182(a)(9) and (10), which therefore should not serve as a basis for denying discretionary relief under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* (Petitioner applied for adjustment of status, 8 U.S.C. § 1255, based upon Petitioner's marriage to a United States citizen, political asylum and withholding of deportation, 8 U.S.C. §§ 1158 and 1253(h), voluntary departure, 8 U.S.C. § 1254(e), and waivers of excludability, 8 U.S.C. §§1182(h) and (i)).

2. Whether petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed *government* "harrassment" and "intimidation".

TOPICAL INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement Of The Case	3
Reasons For Granting The Writ	11
1. The Decision Below Conflicts With The Decisions Of The United States Supreme Court And Other Courts Concerning The Meaning Of "Political Offense" As That Term Is Used To Distinguish Political From Common Criminal Conduct	11
i Overview Of The Law On "Political Offenses"	12
ii Severe Political Disturbances Existed	16
iii Petitioner's Participation In The Political Disturbance	17
iv Petitioner's Acts Were Incidental To Or In Furtherance Of A Political Disturbance	18
2. The Decision Below Raises Significant And Recurring Problems Concerning Resolution Of Prejudicial Government Misconduct In Deportation Proceedings	19
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Page
Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) *cert. denied* 102 S.Ct. 390 (1981)	18
Accardi v. Shaughnessy, 347 U.S. 260 (1954)	20
Baliza v. INS, 696 F.2d 1243 (9th Cir. 1982)	20
Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. (1983)	21
Bridges v. Wixon, 362 U.S. 135 (1945)	20, 21
Cheung v. INS, 418 F.2d 460 (D.C. Cir. 1969)	21
Ex Parte Kolczynski, (1954) 1 Q.B. 540	12
Garcia-Guillen v. U.S., 450 F.2d 1189 (9th Cir. 1971)	18
Hays v. Hatges, 94 F.2d 67 (8th Cir. 1981)	20
In Re Castioni, (1891) 1 Q.B. 149	12, 13
In Re Extradition of McMullen, 28 Cr L. Rptr. 2274, (June 20, 1979)	14
In Re Ezeta, 62 F. 972 (N.D. Ca. 1894)	13
In the Matter of McKin, 80 Cr. Misc. 1 (C.D.N.Y. August 13, 1981)	15
Lopez-Mendoza v. INS, 705 F.2d 1059 (9th Cir. (1973)	21
Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1982)	20
Matter of Garcia-Flores, Interim Decision 2780 (BIA 1980)	21
Matter of K, 4 I&N Dec. 108 (1950)	12, 15, 16, 18
McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)	15
Navarette v. Landon, 223 F.2d 234 (9th Cir. 1955)	20, 21
Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977)	21
Ng Fung Ho v. White, 259 U.S. 276 (1922)	20, 21
Ornelas v. Ruiz, 161 U.S. 502 (1896)	11, 13
Ramos v. Diaz, 179 F.Supp. 459 (S.D. Fla. 1959)	14
Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952)	21

Schtraks v. Government of Israel, 3 All England Law Reports 529 (1962) 13
Sung v. McGrath, 339 U.S. 33 (1950) 20
U.S. *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) 21
United States v. Brough, 15 F.2d 377 (2d Cir. 1956), *cert. denied*, 351 U.S. 911 (1956) 21
United States v. Mackin, 668 F.2d 122 (2d Cir. (1981) 15, 16, 17
Yamataya v. Fisher, 189 U.S. 86 (1903) 20

Statutes and Regulations

Immigration and Nationality Act (INA)
§212(a)(9) 4
§212(a)(10) 4
§212(a)(19) 4
§212(h) 4
§212(i) 4
§241(a)(2) 3
§241(a)(5) 3
§291 3
8 U.S.C.
§1101 ..... i, 2
§1105(a) 11
§1158 ..... i, 2
§1182(a)(9)(10) ..... i, 2, 12
§1182(h) ..... i, 2
§1182(i) ..... i, 2
§1251(a)(2) 3
§1252(b) 20
§1253(h) ..... i, 2
§1254(e) ..... i, 2
§1255 ..... i, 2, 4
§1305 3
§1361 3
28 U.S.C. §1254(1) 2
8 C.F.R. §287.4 20

Constitutions

The United States Constitution
Fifth Amendment 21, 22

Other Authorities

Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Vir.L.Rev. 1226 (1962) 12
Gordon and Rosenfield, *Immigration Law and Procedure* (1981) 12

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michael O'Rourke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 21, 1984.

OPINION BELOW

The opinion of the Court of Appeals, not for publication, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1984. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the offenses for which petitioner O'Rourke was convicted in Ireland — the design and manufacture of weapons as a member of the Irish Republican Army ("IRA"), solely for the IRA —, and his subsequent escape from prison, are "political offenses" within the meaning of 8 U.S.C. §§1182(a)(9) and (10), which therefore should not serve as a basis for denying discretionary relief under the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* (Petitioner applied for adjustment of status, 8 U.S.C. § 1255, based upon Petitioner's marriage to a United States citizen, political asylum and withholding of deportation, 8 U.S.C. §§1158 and 1253(h), voluntary departure, 8 U.S.C. §1254(e), and waivers of excludability, 8 U.S.C. §§1182(h) and (i)).

2. Whether petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed *government* "harrassment" and "intimidation".

STATEMENT OF THE CASE

On October 30, 1979, petitioner Michael O'Rourke was arrested by agents of the Immigration and Naturalization Service (INS). An Order to Show Cause dated October 30, 1979, alleged that Patrick Mannion a/k/a/ Michael O'Rourke was a native and citizen of the Republic of Ireland and that he had "failed to show the time, place, and manner of [his] entry into the United States," and had thereby violated Section 291 of the Immigration and Nationality Act (INA), 8 U.S.C. §1361. Exhibit 1, Record on Appeal in the Court of Appeal (hereinafter "R") 1527 (Petitioner has not requested that the record or any portion thereof be forwarded to the Supreme Court). On November 29, 1979, INS lodged an additional charge that Petitioner had entered the United States without inspection in violation of 8 U.S.C. §1251(a)(2).

At a subsequent hearing on June 17, 1980, O'Rourke testified regarding his name, place and date of birth, and use of a passport in the name of Patrick Mannion to obtain a visa to come to the United States. R 1076-78. The government lodged an additional charge of deportability, 8 U.S.C. §1251(a)(2), based on petitioner's overstay of his nonimmigrant visa. A further charge of deportability was entered alleging that O'Rourke had willfully failed to comply with the former 8 U.S.C. §1305, by failing to register with the INS after his arrival in the United States.

Based on Petitioner's testimony, Judge Hupp found that he had admitted violating section 241(a)(2) by overstaying his visa. R 1113. The Judge found that there was insufficient evidence to sustain a charge under Section 241(a)(5) (failure to register). *Id.* The charge of entry without inspection was terminated. *Id.*

On May 20, 1981, the hearing reconvened before Judge Hupp. R 833. Based on the agency's approval of an

"immediate relative" petition filed by Petitioner's United States citizen wife, (R 156), Petitioner applied for adjustment of status under 8 U.S.C. §1255.[1]

Mrs. O'Rourke, petitioner's wife, testified, describing the hardship she was suffering because of her husband's (then) 20 months of incarceration. R 912.

Petitioner testified about his IRA involvement.[2]

At the end of 1971, he joined the IRA and went through a military-political training course. R 953. In 1972, he began working full time as an IRA engineer. *Id.*[3] Petitioner

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[1]Petitioner also submitted applications for waivers under § §212(h) and 212(i), because of his possible excludability under § § 212(a) (9) and (10) based on his Irish criminal convictions, and under §212(a) (19) based on the possible materiality of his misrepresentation in obtaining a visa. A group of affidavits from individuals who knew O'Rourke in Philadelphia was submitted as Group Exhibit 37. These affidavits detailed O'Rourke's involvement in Philadelphia's Irish community and revealed a hardworking person, a person greatly concerned with Irish politics, helping others and participating in community athletic and social events. The government agreed to accept these affidavits rather than have each of these individuals come to testify in court and stipulated "that if they were called in this proceeding they would testify as they have alleged in the affidavits presented." R 908.

[2]Mrs. O'Rourke testified that her husband had committed no criminal acts in the United States and had not engaged in any activities on behalf of the IRA in the United States. R 919-20. O'Rourke reiterated that he had resigned from the IRA "around the time I met my wife." R 539. "I think I am accepted by them to have had resigned from the IRA, as I have never reported back to my unit or got in touch with them by any means." R 991. The government cross-examined O'Rourke about his willingness "to renounce the violent methods used by the IRA." R 545. O'Rourke expressed his willingness to "*denounce all violence, and that is the violence also of the British Army.*" R 545-6 (emphasis added).

[3]Petitioner was assigned to the General Headquarters engineering unit. R 954. His role involved setting up and supervising engineering factories to manufacture equipment to be used against British forces in the North. R 955. He testified that these factories manufactured the

explained that the material manufactured at the factory he supervised was destined for Northern Ireland and had a twofold purpose: primarily "for use against the British forces," and secondarily to be used in the event of a British declaration of intent to withdraw to "*protect* Catholics in the Catholic areas to control the leaders of the loyalists." R 964-65 (emphasis added). R 1022 *et seq.* Petitioner testified: "I didn't know the specific target[s]." R 1025. Immigration Judge Hupp sought to end the government's repeated questioning about these targets by stating:

> I think the respondent's answer that he was involved in fabricating bombs and didn't know where they were used and [the government's *suggestion* that] they might have been used on civilians is analogous [to the] situation where Americans used their energy to make bombs in World War II which were used to kill civilians of their enemies in Europe, and elsewhere. . .

O'Rourke further elaborated on his understanding of the IRA policy concerning civilian casualties:

> Your Honor . . . there is an army record that a warning order is in force. It is a court martial offense if a warning has not been given.
>
> Irish Republican Army volunteers have been killed and captured going back in to take out charges that have been planted . . .

(footnote continued from previous page)

casing, propulsion unit, mortar tube, base part, base plant plus the bombs, but not the explosive content of rockets. R 958. O'Rourke directed operations relative to the metal work, research and development for these factories. R 961-64. After completion of the metal work, the bombs or mortars were turned over to the IRA quartermaster. R 1021, 1025. O'Rourke also explained that all material manufactured under his supervision was the property of the IRA and strictly for its use. R 968-69.

Petitioner was never directly involved in the use of weapons or explosives. O'Rourke testified that after his arrest in Ireland, he was convicted in a Special Criminal Court used to try IRA offenses. R 946. He was convicted for possession of weapons and explosives at a factory he supervised and for other materials found at his father's home. R 946-47. He was sentenced to six years in Port Laoise Prison, which is used "to house Republicans."[4] R 947.

Petitioner testified about the circumstances surrounding his escape from prison on July 15, 1976. R 979 *et seq.* He explained that the escape was politically motivated and he was "ordered" to participate by the PIRA command.[5] R 981.

Petitioner testified that IRA staff encouraged him to leave Ireland in the wake of reports from his family and subsequently from a member of the IRA intelligence staff that his life was in danger: "that if I were killed it would solve a lot of questions." R 990. Petitioner subsequently

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[4]O'Rourke described the conditions at Port Laoise Prison:

> what they have done is given us [the IRA] special status. . . [We] have the right to wear our own clothes . . . We have the right not to do prison work . . . [B]asically the day-to-day disciplinary action of the inmates is carried out by the IRA staff, by the O.C. and his agent inside the prison.

R 974. O'Rourke described how prison officers communicated to IRA prisoners exclusively through the IRA officer in command of the unit or his designated staff. R 977.

[5]O'Rourke explained that he had been assigned as engineering officer in the escape from a courthouse where he and several other inmates had been brought as witnesses. R 981. Another individual was the officer in charge. *Id.* Precautions were taken by Petitioner to ensure that there were no injuries and, in fact, none occurred. R 983. Although the other escapees were captured almost immediately, O'Rourke succeeded in escaping. R 984-85.

obtained a passport and visitor's visa in the name of Patrick Mannion and used these to come to the United States. 1007-08.

After hearing this testimony, Judge Hupp asked Petitioner where he would live if the Judge permitted him to remain in the United States. R 1050. The Judge further asked him about his prospects for employment in the United States. R 1052. Judge Hupp subsequently explained to Petitioner that the Immigration Act includes a provision that

> after three years' living in marital union — of course, the time you spent incarcerated is not against you as long as you have been man and wife during that time — you can apply and become a naturalized citizen of the United States.

R 1053.

When the government sought to introduce a report prepared by the Alcohol, Tobacco and Firearms Bureau, Department of Treasury, regarding the substances listed in O'Rourke's Irish conviction records, R 1054-55, Judge Hupp indicated that this report was irrelevant to the adjustment application and declined to accept it: "I don't think I have to go into that. It has no bearing on his eligibility to adjustment. We have belabored the point about the bombs and mortars and I see no point in belaboring it any further."

The Court and the parties plainly viewed the case as nearly completed.[6] The parties were to take the deposition

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[6]Judge Hupp indicated that he felt no additional evidence was needed regarding O'Rourke's activities and convictions in Ireland:

> I have now heard enough of what happened in Ireland. I am [now] interested in what happened in the United States.

R 1056.

of a State Department witness, mail the transcript to Judge Hupp, and the case would be closed. R 1069.

The scenario presented at the conclusion of the May 20, 1981, hearing was greatly altered by unanticipated intervening events. On May 22, 1981, two days after the last O'Rourke hearing, Immigration Judge Ernest Hupp was followed home for more than 120 miles by an unmarked black car with two male passengers in civilian clothing. Judge Hupp, believing IRS sympathizers were following him and that he was in grave danger, eventually pulled into a police station and sought protection. R 310-11. The black car then took evasive action and escaped. The FBI along with other law enforcement agencies were called in to investigate the matter. Convinced that he was a potential target of the IRA, and concerned for his life, Judge Hupp wrote a memorandum to the INS Chief Immigration Judge, dated May 29, 1981, stating that he was recusing himself from the proceedings:

> I have in my opinion been unjustly intimidated and harassed and believe the harassment evolves from my presiding in this case.

Exhibit 40, R 1905.

While Judge Hupp advised both the Chief Immigration Judge and the Central Office of INS of the incident, no one informed him that it was, in fact, INS agents who followed him until the morning of June 5, 1981, the date he had scheduled to formally enter an order recusing himself in the O'Rourke case. R 176. In an Order of Recusement, dated June 5, 1981, Judge Hupp explained the basis for his recusal:

> I am of the opinion that I must at this juncture recuse myself because *I have been unjustly harassed and intimidated because of my presiding in this case.*

> On Friday afternoon, May 22, 1981, I was followed . . . for about 125 miles, before I finally drove into the Millersville, Maryland, police department seeking protection. I then believed that perhaps sympathizers of the IRA movement were trailing me.
>
> [Today] two men from the United States Immigration and Naturalization Service . . . advised [me] that they had followed me on Friday, May 22, 1981, because of an *anonymous* complaint (unfounded of course) they had received about the possibility that I have been leaving Philadelphia Immigration Court on Fridays earlier than 4:30 p.m. without charging proper leave. . .

R 310-11 (emphasis added).[7]

On June 29, 1981, the proceedings were reconvened before Immigration Judge Francis J. Lyons who announced, "I am taking jurisdiction." R 789. Immigration Judge Lyons blocked *any* inquiry into the Judge Hupp incident, stating "*this has absolutely nothing to do with this case.*" R 794 (emphasis added). Nowhere does the record reflect on what facts Judge Lyons reached this conclusion.[8] Over

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[7] As a result of this incident Judge Hupp required "medical care". R 178. In a newspaper article dated June 21, 1981, Judge Hupp's wife is quoted as "speaking for her husband" and states that "the government action [of intimidating the Judge] was prompted by *overzealous immigration officials who suspected that the Judge was prepared to rule in O'Rourke's favor.*" R 150 (emphasis added). Judge Hupp reportedly told his wife "they just wanted to scare me to get me off the case." *Id.* Judge Hupp has been prohibited from speaking about the incident.

[8] While petitioner was denied the opportunity to explore these matters in a *de novo* fashion during his deportation proceeding, the government subsequently and unilaterally submitted declarations

counsel's objection, Judge Lyons resumed and concluded the proceedings. Rather than picking up where Judge Hupp had left off, with no further testimony to be taken other than a deposition, Judge Lyons allowed the presentation of additional witnesses.[9]

On July 12, 1982, Judge Lyons issued his decision denying O'Rourke's various applications for relief from deportation. The Immigration Judge apparently believed that petitioner had engaged in common, non-political offenses. R 10. Petitioner appealed this decision to the Board of Immigration Appeals, which issued a decision dismissing his appeal on May 24, 1983.[10] The Board

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directly to the Board of Immigration Appeals declaring innocence. R 177-179. The agents actually involved in the incident are never identified. INS claims that Judge Hupp was followed home for 125 miles by INS agents because of an "anonymous" complaint that he was leaving work early. R 165. This anonymous complaint was allegedly received "on February 11, 1979," *more than two years before he was followed home. Id.* An "investigator" was not "assigned" to investigate Judge Hupp until February 1981, after petitioner's deportation proceedings were initiated. R 175. He was not followed home until two days after the O'Rourke hearing had ended.

[9]However, when Petitioner's counsel sought to elicit additional testimony from Petitioner regarding his reasons for engaging in the activities which led to his Irish criminal convictions, Judge Lyons stated, "I don't need to hear what has already been heard by Mr. Hupp."

> MR. MYERS: Your Honor, we have a continuing objection to your refusing to judge the credibility and demeanor of witnesses and only trying to judge it based on reading the record. . .
>
> THE COURT: I don't need repetition of all of the testimony before Judge Hupp. R 769.

[10]The Board — misstating the facts — found that "[O'Rourke's] indiscriminate terrorist use of explosives is atrocious in nature and out of proportion to the political goal of ending British domination over

denied the applications for adjustment of status, political asylum, withholding of deportation based on fear of political persecution, and for voluntary departure in lieu of formal deportation. The Board held, *inter alia*, that Petitioner's admission would be detrimental to U.S. relations with the Republic of Ireland and Great Britain. R 5 and 7. An appeal was taken to the Second Circuit Court of Appeals pursuant to 8 U.S.C. §1105a. The Court of Appeals dismissed the appeal by opinion dated February 21, 1984. *See* Appendix.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of The United States Supreme Court and Other Courts Concerning The Meaning of "Political Offense" as That Term is Used to Distinguish Political From Common Criminal Conduct

The Court of Appeals held that "petitioner's crimes were not political." And the "Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes." The possession of firearms and explosives "*presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be.*" (Emphasis added.) Petitioner respectfully suggests that the lower court failed to apply the proper legal standards in evaluating the "political" versus "common" nature of Petitioner's Irish convictions. This Court has only once addressed the issue, in *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

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Northern Ireland." The Board also found that Petitioner's contention that "[Judge Hupp] would have ruled differently, but was intimidated into withdrawing, is neither supported by the record nor any longer relevant . . ." R 8.

8 U.S.C. Sections 1182(a)(9) and (10) specify that excludability of immigrants cannot be premised on purely "political" offenses. *See generally* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 2.43d, page 2-317 (1981). This section benefits those whose punishment emerged from political activities rather than common crimes. H. Rep. 2096, 82d Cong., 2d Sess., 127.

(i) Overview of the Law on "Political Offenses"

Given the paucity of authority on interpretations of Sections 1182(a) (9) and (10), the Board of Immigration Appeals relies upon extradition cases in determining what is a "political" versus "common" offense. *See, e.g., Matter of K*, 4 I&N Dec. 108, 110-116 (1950). Many American judicial interpretations of the political offense exception, as well as decisions of the Board of Immigration Appeals, begin their analysis with the seminal British case, *In Re Castioni*, [1981] 1 Q.B. 149.[11] The British court maintained that persons should not be returned to

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[11]The issue posed in *Castioni* was whether "the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part." *Id.*, at 159. The "incidence" test was later significantly diluted by the decision in *Ex Parte Kolczynski*, [1954] 1 Q.B. 540. In *Kolczynski* seven members of a Polish fishing vessel avoided extradition even though the Polish government accused them of common crimes, including wounding a member of the crew of their ship and revolting on board. Their actions were characterized as political although not taking place in Poland. The decision recognized that in the contemporary spectrum an "offense may be directed from foreign territory." Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Virginia Law Review 1226, 1242 (1962). Rather than determining whether the actions in questions were "incidental" to a political disturbance, the *Kolczynski* decision examined the "political character" of those actions and denied extradition.

governments where they face prosecution for crimes "if those crimes were incidental to and formed a part of political disturbances." *In Re Castioni, supra,* at 166.

The British court held in *Schtraks v. Government of Israel,* 3 All England Law Reports 529, 534 (1962), that

> [the political offense exception cannot] be limited to cases of open insurrection. An underground resistance movement may be attempting to overthrow a government, and it could hardly be that an offense, committed the day before open hostilities broke out, would be treated as non-political, while a precisely similar offense, committed two days later would be of a political character.

Ibid.

American extradition practice regarding the political offense exception is historically traceable to the *Castioni* case and its progeny. The American position was first illustrated by *In Re Ezeta,* 62 Fed. 972, 977-999 (N.D. Cal. 1894), in which the Salvadoran government sought the extradition of several people charged with murder and robbery. The acts took place while combatting a revolution and the district court denied extradition because the crimes were "associated . . . with the actual conflict of armed forces, [and] are of a political nature." *Id.*, at 999.

Two years later the Supreme Court issued its decision in *Ornelas v. Ruiz,* 161 U.S. 502 (1896).[12] The Court held that given "the character of the foray, the nature of

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[12]In *Ornelas* the Republic of Mexico sought the extradition of three individuals who had crossed from the U.S. into Mexico with a band of about 140 armed men, and then, acting as a group, attacked, pillaged, kidnapped, robbed and terrorized forty Mexican soldiers and a town and its citizens. They were later charged with murder, arson, robbery and kidnapping. *Id.*, at 511-2.

the attack, the persons killed or captured, and the kinds of property taken or destroyed," the petitioners were not in aid of a political revolt, an insurrection or a civil war. *Id.*, at 511.[13]

In *In re Extradition of McMullen*, 28 Cr. L. Rptr. 2274 (June 20, 1979), Magis. Case No. 3-78-1099MG (N.D.Cal. May 11, 1979), the Government of the United Kingdom sought the extradition of McMullen, an established member of the PIRA for the alleged bombings of certain British army installations. The court held that (1) an insurrection or political disturbance did exist, *In re McMullen*, at 4, (2) that Britain and its military facilities were the main targets of the PIRA, *Id.*, at 2, and (3) with respect to the crime, McMullen acted as a member of the PIRA. *Id.* After studying the history and activities of the PIRA — for which Petitioner in this case designed arms — the court stated that the "organization within and without the borders of Northern Ireland has continued to press and to this day continues to fight for Northern Ireland's independence from British rule." *Id.*, at 2. The court also noted that "the British army and its facilities were prime targets for the PIRA's guerilla warfare." *Id.*, at 5. The

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[13]In *Ramos v. Diaz*, 149 F.Supp. 459 (S.D. Fla. 1959), the Government of Cuba sought extradition of two escapees from a Cuban prison who had been convicted of murdering a prisoner immediately after the fall of the Batista Government. The escapees were Castro supporters and soldiers. The court found that the defendants were active participants in the revolutionary movement, that the crime was "part of a political uprising and disturbance," and that the defendants "bore no ill-will or malice toward their victim, who was just one of many political prisoners captured in furtherance of the political rising." *Id.*, at 463. Despite the lack of exact contemporaneity with a political uprising, and although the defendants were part of the party which now controlled Cuba, the court held that the alleged crime was a non-extradictable political offense. *Id.*, at 463-64.

court concluded that the defendant's acts were not motivated by vengeance or personal motives, but that his act "was a crime incident to . . . a political disturbance, uprising . . . and in furtherance thereof." *Id.*, at 5-6.[14]

Still more recently the political offense exception was dealt with in *In the Matter of Mackin*, 80 Cr. Misc. 1, p. 50 (S.D.N.Y. August 13, 1981), *aff'd United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981). Mackin, like McMullen and Petitioner herein, was a member of the PIRA. He was indicted in Northern Ireland for attempted murder and other charges including possession of explosives. *Id.*, at 124. Like Petitioner herein, he was captured and then escaped coming to the United States illegally. *Ibid.* The magistrate held that

> while this one act [shooting a soldier] could not possibly bring to fruition the goals of the PIRA, it was undoubtedly free from personal motive and substantially linked to the traditional goals and strategy of the IRA and PIRA: an independent Ireland, free from British rule through the use of violence.

Id., 80 Cr. Misc. at 98.

In *Matter of K, supra*, the leading Board of Immigration Appeals decision on the political offense exception, the Board was called upon to rule whether a crime was a purely political offense and therefore not a ground for excludability. Noting the complete absence of legislative history on the meaning of a purely political offense, the Board concluded that "in order for an offense to constitute a political one, there must be concerted action for a

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[14]The U.S. Government was later unsuccessful in deporting McMullen. He was granted political asylum by order of the Ninth Circuit Court of Appeals. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

political purpose." *Id.*, at 118. The Board also articulated the test as follows:

> [A] person acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he is taking part is a political offender and so entitled to asylum in this country . . .

Matter of K, supra, at 115. The respondent in *Matter of K* was convicted in Poland for killing the Russian Ambassador. *Id.*, at 109. He acted alone and not as part of a political rising and his acts were therefore deemed to be common crimes. *Id.*, *at* 118.

The lower courts are clearly in need of guidance on the appropriate standards to use in evaluating the difference between "political" and "common" crimes.

Applying the standards described above to the facts in this case, it is clear that (1) there was an on-going rebellion or political disturbance at the time of the offenses in question, (2) Petitioner was a member of the uprising group, and (3) the offenses were incidental and in furtherance of the political disturbance.

(II) Severe Political Disturbances Existed

Since 1921 the island popularly known as Ireland has been divided into two states: the southern portion, presently the Republic of Ireland, and the northern portion, part of the United Kingdom. *Mackin, supra,* at 49. In every decade since the establishment of the Northern Ireland state,

> the IRA and its ideological successor, the PIRA, has engaged in sporadic armed violence in opposition to British domination, in support of

> an independent, unified Irish nation, and, during the last fifteen years, in response to the Unionist Government's discrimination against the Catholic minority.

Id., at 55. In response, "both the [British] Parliament and the Dublin government in the Republic [of Ireland] introduced internment without trial, arresting people who were identified as members of the IRA." *Ibid.* The court in Mackin described the PIRA as being involved in a "quasi-military conflict." *Id.*, at 63. The British government has described the conflict with the PIRA as follows:

> "[The PIRA is] committed to a long-term campaign of attrition against the British in the north of Ireland, with the overall objective of a nationalist state, an independent Ireland; with the overall objective of driving the British army out of Northern Ireland and of joining the Northern Ireland state to make a united Ireland with the South."

Id., at 64.

While Petitioner's activities took place in the Republic of Ireland, not in the north, the Immigration Judge concluded that the IRA's and PIRA's "organizational and operational activities have also been carried on in the Republic of Ireland." R 19. The court in *Mackin* likewise found that the PIRA's activities took place in the north, "and at a later stage in the Republic of Ireland . . ." *Mackin, supra,* at 59.

(iii) Petitioner's Participation in the Political Disturbance

As discussed in the Statement of the Case, petitioner testified extensively about his involvement in the PIRA. R 945, *et seq.* Immigration Judge Lyons found that Petitioner

was "a member of the IRA." R 19. And, "*[t]he criminal activities for which he was convicted were undertaken on behalf of the IRA and PIRA . . .*" *Ibid.* (emphasis added). The Judge also found that Petitioner's "*unlawful activities stemmed from his membership in the Provisional Irish Republican Army.*" R 3 (emphasis added).

In the words of the Board of Immigration Appeals, Petitioner was engaged in "concerted action" rather than individual acts. *In the Matter of K, supra,* at 118.

(iv) Petitioner's Acts Were Incidental to or In Furtherance of a Political Disturbance

In this case the Petitioner's acts were carefully pre-planned and directed by the PIRA. Petitioner was not engaged in individual acts nor did he commit acts of indiscriminate violence. He was informed that the weapons he designed and manufactured were for use solely by the PIRA against "British occupation forces . . ." R 959. Not for the "bombing of civilians." R 1031.

Petitioner's activities were clearly "incidental" to the military objectives of the PIRA. *Garcia-Guillen v. United States,* 450 F.2d 1189 (9th Cir. 1971), *cert. denied,* 405 U.S. 989. There was a "substantial tie" between his acts and the goals of the PIRA. *Abu Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied* 102 S.Ct. 390 (1981).

The Immigration Judge, Board of Immigration Appeals, and Court of Appeals all relied almost exclusively on Petitioner's conduct in Ireland as the basis for denying discretionary relief from deportation. The complete failure of the Court of Appeals to address the historical standards used in American jurisprudence to evaluate the political nature of offenses, and the general lack of authoritative precedents in this area, justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises Significant and Recurring Problems Concerning Resolution of Prejudicial Government Misconduct in Deportation Proceedings

The original Immigration Judge in this case, Ernest Hupp, after concluding the proceedings, except for a deposition to be taken outside of his presence, recused himself on the ground that the government had "intimidated" and "harassed" him. R 310-11, 1905. Judge Hupp stated that he "sincerely believed" that this intimidation occurred "because I have been involved in the O'Rourke case." R 311.

Petitioner's attempted inquiry into these events was blocked by the new Immigration Judge assigned to the case. In fact, "efforts by Petitioner's counsel to investigate the allegations of Judge Hupp have been thwarted by INS [which] has built a wall of silence around the matter. . ." R 149. *Judge Hupp himself was ordered "not to discuss the matter on pain of administrative action." Id.* (emphasis added).

The Board of Immigration Appeals, ignoring the *possibility* that government misconduct might have occurred, concluded only that this issue was no "longer relevant, because of our independent review of the evidence of appeal." *Id.* at 7. The Court of Appeals found the issue to be so lacking in substance as to "merit no discussion." Appendix.[15]

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[15]Only because of a declaration filed by INS directly with the Board of Immigration Appeals after the record had closed — and thus never subject to cross-examination — we are informed by a government agent (we do not even know if he was one of the agents who actually followed Judge Hupp - his declaration says nothing about this) that "this investigation was entirely unconnected to the proceedings against Michael O'Rourke." R 175. The declaration states that neither the Assistant U.S. Attorney representing the government in

Petitioner had a due process right to a *fair* deportation hearing, free of prejudicial government misconduct. *Yamataya v. Fisher*, 189 U.S. 86 (1903); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Bridges v. Wixon*, 362 U.S. 135 (1945); *Sung v. McGrath*, 339 U.S. 33 (1950); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This right is beyond doubt. The deportation hearing must conform to traditional standards of fairness.

Petitioner timely sought and *continues to seek the opportunity to obtain and present evidence* (including perhaps administrative discovery pursuant to 8 C.F.R. §287.4), and to cross-examine the government's affiants, R 175-182, regarding the Judge Hupp incident.

Since respondent so avidly relieds upon *ex parte* government declarations to establish the *absence* of government misconduct during Petitioner's deportation hearing, Petitioner is clearly entitled to the *right* to cross-examine the affiants and present counter-evidence.

8 U.S.C. 1252(b) provides that the "alien shall have a reasonable opportunity" to examine the evidence against him and present evidence on his own behalf. On the right to cross-examination in deportation hearings, *see Baliza v. INS*, 696 F.2d 1243 (9th Cir. 1982); *Maltez v. Nagle*, 27 F.2d 835 (9th Cir. 1982); *Hays v. Hatges*, 94 F.2d 67 (8th Cir. 1981); *Navarette v. Landon*, 223 F.2d 234 (9th

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(footnote continued from previous page)

Petitioner's deportation hearing nor the local INS District Director "had any knowledge of this Administrative Investigation until May 29, 1981," a few days after Judge Hupp was followed. R 175. The declaration does *not* state that other INS agents involved in the O'Rourke proceedings were also so *un*informed. *Id.* This Court might well question whether an INS agent would conduct an investigation of an Immigration Judge in a local INS office without advising the INS District Director.

Cir. 1955); *United States v. Brough,* 15 F.2d 377 (2d Cir. 1956), *cert. denied,* 351 U.S. 911 (1956); *Sardo v. McGrath,* 196 F.2d 20 (D.C. Cir. 1952).

In this case the affiants (whose declarations were not added to the record until after the deportation hearing) and those involved in the Judge Hupp incident were available as witnesses. Respondent argued in the Court of Appeals that Judge Lyons, who replaced Judge Hupp, was "well within his discretion" in denying Petitioner's request for an evidentiary hearing on the circumstances surrounding Judge Hupp's recusal. We respectfully suggest that Judge Lyon's discretion was circumscribed by the due process clause of the Fifth Amendment which guarantees a *fair* deportation hearing.

The Board of Immigration Appeals and the federal courts have repeatedly reversed deportation orders where serious government misconduct is shown. *U.S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 267 (1954); *Benitez-Mendez v. INS,* 707 F.2d 1107 (9th Cir. 1983); *Lopez-Mendoza v. INS,* 705 F.2d 1059 (9th Cir. 1973); *Navia-Duran v. INS,* 568 F.2d 803 (1st Cir. 1977); *Cheung v. INS,* 418 F.2d 460 (D.C. Cir. 1969); *Matter of Garcia-Flores,* Interim Decision No. 2780 (BIA 1980).

Deportation "visits a great hardship on the individual . . ." *Bridges v. Wixon,* 362 U.S. 135, 136 (1945). Mr. Justice Brandeis noted that deportation often involves the loss of "all that makes life worth living . . ." *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922). Where potential government misconduct takes place — and particularly where the Immigration Judge himself withdraws from the case based on his allegation of government "harassment" and "intimidation" — the respondent in a deportation hearing should, at least, be entitled to an evidentiary

hearing on the issue. Such a hearing was denied in this case. The INS ordered Judge Hupp not to speak out about his recussal upon pain of "administrative action."

The due process clause must require a remand for further proceedings and the formulation of a remedy by the Immigration Court in the event that prejudicial government misconduct is established.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of February, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. WILLIAM H. TIMBERS, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. EDWARD D. RE, Chief Judge, U.S. Court of International Trade*

MICHAEL O'ROURKE,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER
83-4107

FILED: February 21, 1984

* Sitting by designation

Michael O'Rourke petitions this Court, pursuant to 8 U.S.C. § 1105a for review of a decision of the Board of Immigration Appeals (BIA), dated May 24, 1983, that dismissed his appeal from a decision of Immigration Judge Lyons, dated July 12, 1982. The judge's decision denied O'Rourke's application for adjustment of his nonimmigrant status under section 245 of the Immigration and Nationality Act of 1952, as amended, (Act) 8 U.S.C. § 1255, denied his request for waiver of inadmissability under sections 212(h) and (i) of the Act, 8 U.S.C. § 1182(h) & (i), denied his request for asylum as a political refugee under section 208 of the Act, 8 U.S.C. § 1158, denied his request for withholding deportation to the Republic of Ireland under section 243(h) of the Act, 8 U.S.C. § 1253(h), and denied his request for voluntary departure under

section 244(e) of the Act, 8 U.S.C. § 1254(e). The judge accordingly entered an order for petitioner's deportation. In addition to rejecting petitioner's claims that these denials were erroneous, the BIA rejected petitioner's contention that he had been deprived of due process in the deportation proceedings.

The adjustment of an alien's status under 8 U.S.C. § 1255 is committed to the discretion of the Attorney General and, in turn, to those to whom he delegates the administration of the immigration laws. Similarly, grants of asylum under 8 U.S.C. § 1158 and voluntary departure under 8 U.S.C. § 1254(e) are committed to the discretion of those who administer the Act. We find no abuse of discretion in this case. Petitioner entered the United States by using a false name and a false

passport. In order to obtain a visa, he lied not only about his identity, but also about his purpose in coming to this country. He overstayed the time permitted under the visa that he had obtained by misrepresentation. During the early stages of his deportation proceedings he refused to cooperate, even to the extent of revealing his true identity. These acts support the denial of discretionery relief. See Jain v. INS, 612 F.2d 683 (2d Cir.1979), cert. denied, 446 U.S. 937 (1980); Fulgencio v. INS, 573 F.2d 596, 597-98 (9th Cir. 1978). Petitioner's marriage to an American did not mandate a different conclusion. Although marriage to an American may be a significant factor favoring adjustment, it does not necessarily outweigh negative factors, even in cases where a wife's dependence on her

spouse is far greater than the dependence apparent here. See Noori-Khajavi v. INS, 548 F. Supp 150, 154 (E.D. Mo. 1982). The conclusion that petitioner had not shown sufficient equities to overcome the numerous factors weighing against adjustment was not arbitrary, capricious or an abuse of discretion. See Santos v. INS, 375 F.2d 262, 264 (9th Cir. 1967).

Petitioner argues that the BIA erred in failing to consider whether his crimes in the Republic of Ireland were political offenses and thus not a ground for exclusion. He contends that, unless the BIA first determined that his crimes were nonpolitical, they could not consider the crimes as a factor in deciding whether to grant adjustment. This argument founders on the fact that, insofar as they relate to the Republic of Ireland, petitioner's

crimes were not political. Moreover, petitioner's contention overlooks the many factors other than petitioner's convictions which warranted an exericse of discretion adverse to petitioner.

The BIA's denial of petitioner's request for withholding deportation under 8 U.S.C. § 1253(h) also was proper. The test for withholding deportation under section 1253 is whether the applicant has a well-founded fear of persecution on account of race, religion, political opinion, nationality or membership in a particular social group. See Stevic v. Sava, 678 F.2d 401, 404-09 (2d Cir. 1982), cert. granted sub nom., INS v. Stevic, 103 S. Ct. 1249 (1983); 8 U.S.C. §§ 1101(a)(42), 1253(h). Petitioner proffers vague and general claims that he fears for his life in the Republic of Ireland because of various incidents in

which the Provisional Irish Republican Army was allegedly involved as a basis for a well-founded fear of political persecution. Although it is not necessary under section 1253(h) to show a clear probability of persecution, see Stevic v. Sava, supra, 678 F.2d at 409, the reasonableness of an applicant's fear remains a factor. Id. However, petitioner has not shown, through his vague and general claims, that his fear is reasonable. The very fact that he was willing to remain in the Republic of Ireland for a year or so after first learning of the alleged threat and that he had expressed the intent to return to his homeland belies the existence of even subjective fear.

Petitioner's argument that he has a well-founded fear of political persecution rests primarily on the claim that

his offenses were political and that punishment for them would be persecution. This is not a persuasive argument. The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution. See Note, The Right of Asylum in United States Law, 80 Colum. L. Rev. 1125, 1146 (1980). The Republic of Ireland also has a valid nonpolitical interest in prosecuting those who escape from prison, particularly when explosives

are used to accomplish the escape. As pointed out in the United Nations Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Paragraph 84 (Geneva 1979), where anticipated punishment conforms with the general law of the punishing country, fear of prosecution alone will not make an applicant a political refugee.

Finally, although petitioner claims that he will be imprisoned for a term of anywhere from 18 years to life for his escape and that, therefore, his punishment will be excessive and constitute persecution, he present no proof that his fear is justified. Instead, he relies on his unsubstantiated assertions about the sentences he could anticipate. While in some cases all that will be available

concerning persecution is the applicant's testimony, on an issue such as criminal sentencing in the Republic of Ireland, where proof is readily available, failure to produce it supports a conclusion that the fear is not well-founded. We conclude that petitioner's application for political asylum under 8 U.S.C. § 1253(h) was properly denied.

Petitioner's due process claims arising out of Judge Hupp's decision to recuse himself are so lacking in substance as to merit no discussion.

The petition for review is denied. Mandate shall issue forthwith.

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Hon. Edward D. Re

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 256 South Occidental Boulevard, Los Angeles, California 90057; that on March 30, 1984, I served the within *Petition For A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Hand delivered: forty copies and original.)

Solicitor General
Department of Justice
Washington, D.C. 20530
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 1984, at Los Angeles, California.

Carlos Holguin
(Original signed)

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